Stan Scott d/b/a Scott Brothers Dairy, a Sole Proprietorship *and* Wholesale and Retail Food Distribution Teamsters Local 63, affiliated with International Brotherhood of Teamsters, AFL–CIO and Stephen Edmondston, Party in Interest. Cases 31–CA–23438, 31–CA–23704, and 31–CA–23741

December 26, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On June 7, 1999, Administrative Law Judge Frederick C. Herzog issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Respondent filed "exceptions to the General Counsel's answering brief."

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, to modify the remedy,[2] and to adopt the recommended Order, as modified and set forth in full below.[3]

We agree with the judge, for all the reasons he stated, that the Respondent's withdrawal of recognition was tainted by its serious unremedied unfair labor practices. The Board has consistently held that certain kinds of unfair labor practices are likely to cause employee disaffection from their bargaining representative.[4] We conclude, as did the judge, that the unfair labor practices the Respondent committed in this case had a tendency to undermine the unit employees' support for the Union. These violations include polling employees concerning their own and other employees' union activities, soliciting employees to sign an antiunion petition, threatening employees that it would not sign another union contract, impliedly threatening employees with job loss if they persisted with contract demands and with the futility of bargaining if they continued to support the Union, and unilaterally changing employees' terms and conditions of employment in the absence of a bargaining impasse. Thus, in this context, the Respondent could not justify its withdrawal of recognition and thereby lawfully sever its bargaining relationship by presenting evidence of employee dissatisfaction with the Union.

We further conclude that, even in the absence of any unfair labor practices, this Respondent had no valid basis for withdrawing recognition. We agree with the judge that the Respondent's asserted belief that some employees were not current in their dues payments to the Union does not constitute a basis for the Respondent's withdrawal of recognition. Although a decertification petition had been filed approximately 4 months before the withdrawal, there is no evidence in the record that it was supported by a majority.[5] Further, it is unclear whether the Respondent relied on this petition in withdrawing recognition and, in any event, the Respondent has not relied on the petition in its brief on exceptions. For these reasons, the decertification petition, even assuming that it was not tainted by the Respondent's unfair labor practices, is insufficient to establish that the Respondent lawfully withdrew recognition based on a good-faith doubt as to the Union's continuing majority status.[6]

Our conclusion in this regard is not altered by the Supreme Court's decision in *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998). In that case, the Court held that "doubt" meant "uncertainty," so that the test could be phrased in terms of whether the employer "lacked a genuine, reasonable uncertainty about whether [the union] enjoyed the continuing support of a majority of unit employees." Id. at 367. We find that the Respondent's asserted basis for its withdrawal of recognition is insufficient, regardless of whether the test is phrased in terms of "good faith reasonable doubt" of the Union's majority support or "genuine, reasonable uncertainty about whether the Union enjoyed the continuing support of a majority of unit employees." See, e.g., *Scepter Ingot Castings,* 331 NLRB No. 153 (2000).[7]

[1] Based on our recent decision in *Hacienda Resort Hotel & Casino*, 331 NLRB No. 89 (2000), the General Counsel has moved to withdraw the allegation that the Respondent violated Sec. 8(a)(5) of the Act by discontinuing dues checkoff for the unit employees on expiration of the parties' collective-bargaining agreement. We grant the General Counsel's motion, vacate the judge's finding that the Respondent further violated the Act by this conduct, and shall modify the judge's conclusions of law, Order, and notice accordingly.

[2] As the judge found, the Respondent violated Sec. 8(a)(5) by refusing to grant the Union's representatives access to its premises after withdrawing recognition from the Union. We modify the judge's remedy, Order, and notice to include a provision that the Respondent grant the Union access to its premises as required by the parties' expired collective-bargaining agreement.

[3] We shall set forth in full a new Order to conform with the requirements of *Excel Container*, 325 NLRB 17 (1997). That Order, as well as the attached notice, shall reflect the General Counsel's withdrawal of the allegation that the Respondent unlawfully ceased making dues deductions for the unit employees and remitting such funds to the Union on contract expiration.

[4] See, e.g., *Master Slack Corp*., 271 NLRB 78, 84 (1984).

[5] The Regional Director dismissed the petition about 2 months before the Respondent withdrew recognition based on evidence that the showing of interest was tainted by virtue of the Respondent's participation in obtaining it and by various unfair labor practices that preceded its filing.

[6] Also, as the judge found, there is no evidence demonstrating that the Union ever lost its majority status among the unit employees, and the Respondent does not argue to the contrary in its brief on exceptions.

[7] Member Hurtgen agrees with his colleagues that the employee disaffection from the Union was tainted by the Respondent's antecedent unfair labor practices. Member Hurtgen does not reach the issue of whether, absent such unfair labor practices, the disaffection would have been sufficient to privilege a withdrawal of recognition. See *Allentown Mack v. NLRB*, supra. However, as to that issue, he wishes to make it clear that he believes that the "uncertainty" test of *Allentown Mack* is the appropriate one.

We also agree, for the reasons fully set forth in *Caterair International*, 322 NLRB 64 (1996), that an affirmative bargaining order is warranted in this case as a remedy for the Respondent's unlawful withdrawal of recognition from the Union. We adhere to the view, reaffirmed by the Board in that case, that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." Id. at 68.

In several cases, however, the U.S. Court of Appeals for the District of Columbia Circuit has required that the Board justify, on the facts of each case, the imposition of such an order. See, e.g., *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Building Material v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); and *Exxel/Atmos v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In the *Vincent* case, the court summarized the court's law as requiring that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." Id. at 738.

Although we respectfully disagree with the court's requirement for the reasons set forth in *Caterair*, we have examined the particular facts of this case as the court requires and find that a balancing of the three factors warrants an affirmative bargaining order.[8]

(1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the employer's withdrawal of recognition. An affirmative bargaining order, with its attendant bar to raising a question concerning the Union's continuing majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation.

Moreover, we note that, in addition to unlawfully withdrawing recognition, the Respondent also refused to bargain with the Union by unilaterally implementing a wage increase and 401(k) plan for the unit employees, unilaterally changing employees' health and welfare benefits, prohibiting the Union's representatives from gaining access to its premises as provided in the expired collective-bargaining agreement, and refusing the Union's request for information necessary for and relevant to the bargaining process. The Respondent also polled employees concerning their own and other employees' union activities; solicited employees to sign an antiunion petition; coercively interrogated employees; threatened employees that it would not sign another collective-bargaining agreement with the Union; told employees that it would sell the business before signing another union contract; and impliedly threatened employees with job loss if they persisted with contract demands and the futility of bargaining if they continued to support the Union. We stress that, as the judge found, the evidence in this case fails to establish that the Union ever actually lost its majority status and the Respondent does not contend otherwise. Even if it did, that loss of majority would not reflect employee free choice under Section 7 of the Act, but the effect of the Respondent's unfair labor practices. We find that these additional circumstances further support giving greater weight to the Section 7 rights that were infringed by the Respondent's unlawful withdrawal of recognition.

(2) The affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it removes the Respondent's incentive to delay bargaining in the hope of further discouraging support for the Union. It also ensures that the Union will not be pressured, by the possibility of a decertification petition, to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and issuance of a cease-and-desist order.

(3) A cease-and-desist order, without a temporary decertification bar, would be inadequate to remedy the Respondent's violations because it would permit a decertification petition to be filed before the Respondent had afforded the employees a reasonable time to regroup and bargain through their representative in an effort to reach a collective-bargaining agreement. Such a result would be particularly unfair in circumstances such as those here, where litigation of the Union's charges took several years and the Respondent's unfair labor practices were of a continuing nature and were thus likely to have a continuing effect, thereby tainting any employee disaffection from the Union arising during that period or immediately thereafter. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued union representation.

For all the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the allegations in this case.[9]

[8] Member Hurtgen agrees with the court's requirement.

[9] See generally *Raven Government Services*, 331 NLRB No. 84, slip op. at 1–2 (2000).

Member Hurtgen agrees that, based on the conduct in the instant case, an affirmative bargaining order is appropriate. More particularly, the Respondent engaged in significant 8(a)(5) conduct by making unilateral changes in employees' terms and conditions of employment in

AMENDED CONCLUSION OF LAW

Delete Conclusion of Law 6(f).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Stan Scott d/b/a Scott Brothers Dairy, a Sole Proprietorship, Chino, California, his officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain collectively in good faith with respect to wages, hours, and other terms and conditions of employment with Wholesale and Retail Food Distribution Teamsters Local 63, affiliated with the International Brotherhood of Teamsters, AFL–CIO, as the exclusive collective-bargaining representative of employees in the following appropriate unit, and cease and desist from making unilateral changes in terms and conditions of employment where no bargaining impasse exists and which, in any event, are inconsistent with its last and final offer to the Union.

> All milk plant and combination plant employees, wholesale route drivers, semi-truck drivers and tank drivers employed by the Respondent at its Chino, California facility; excluding all other employees, guards, and supervisors as defined bythe Act.

(b) Refusing to bargain collectively with the Union by changing bargaining unit employees' wages, hours, or other terms and conditions of employment, including their health and welfare benefits and their pension plans (including a 401(k) plan), without bargaining with the Union in good faith to a valid impasse.

(c) Refusing to bargain collectively with the Union by failing and refusing to provide information that the Union has requested and that is necessary for the Union to carry out its duties as the exclusive and duly designated collective-bargaining representative of the unit employees.

(d) Refusing to bargain collectively with the Union by refusing to permit the Union's authorized representatives to have access to the Respondent's premises so that they may carry out their duties as the duly designated collective-bargaining representative of the unit employees.

(e) Interrogating employees concerning their union membership or activities.

(f) Polling employees concerning their own and other employees' union activities, leanings, and sympathies without first giving them requisite assurances that their answers will not be used against them.

(g) Soliciting employees to sign antiunion cards or petitions.

(h) Threatening employees that it would not sign another union contract; telling employees that the Respondent would sell the business before signing another union contract; and impliedly threatening employees with job loss if the Union persisted with contract demands and with the futility of bargaining if they continued to support the Union.

(i) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of the unit employees with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and, if an agreement is reached, embody such understanding in a signed agreement.

(b) Within 14 days from the date of this Order, make whole the bargaining unit employees by paying all pension, health, and welfare contributions as provided in the collective-bargaining agreement between the Respondent and the Union that terminated May 30, 1998, which have not been paid and which would have been paid but for the Respondent's unlawful conduct, and continue such payments until the time set forth in the remedy section of the decision.

(c) On the Union's written request, and in the manner set forth in the remedy section of the decision, rescind the medical and dental insurance coverage for the unit employees which the Respondent has unlawfully implemented and immediately re-establish for these employees, without any lapse in coverage, the medical and dental insurance coverage that the Respondent unlawfully terminated.

(d) Within 14 days from the date of this Order, provide the Union with the information that the Union requested on January 26, 1999.

(e) Within 14 days from the date of this Order, grant the Union's representatives access to its premises as required by the parties' expired collective-bargaining agreement.

(f) Within 14 days from the date of this Order, make whole the unit employees for any losses they sustained as a result of the Respondent's contributions to health and welfare funds other than those authorized by employees as indicated above.

(g) On the Union's written request, rescind the 401(k) plan that the Respondent unilaterally implemented in violation of the Act.

(h) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and

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the absence of a bargaining impasse before the ultimate 8(a)(5) violations that include the withdrawal of recognition. In these circumstances, it is appropriate to give the Union a reasonable period in which to regain the status that it enjoyed before the unlawful conduct.

copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its premises in Chino, California, in English and Spanish, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at his own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 27, 1998.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain collectively in good faith with respect to wages, hours, and other terms and conditions of employment with Wholesale and Retail Food Distribution Teamsters Local 63, affiliated with the International Brotherhood of Teamsters, AFL–CIO, as the exclusive collective-bargaining representative of employees in the following appropriate unit, and WE WILL NOT make unilateral changes in terms and conditions of employment where no bargaining impasse exists and which, in any event, are inconsistent with our last and final offer to the Union.

> All milk plant and combination plant employees, wholesale route drivers, semi-truck drivers and tank drivers employed by us at our Chino, California facility; excluding all other employees, guards, and supervisors as defined by the Act.

WE WILL NOT refuse to bargain collectively with the Union by unilaterally changing our bargaining unit employees' wages, hours, or other terms and conditions of employment, including their health and welfare benefits and their pension plans (including a 401(k) plan), without bargaining with the Union in good faith to a valid impasse.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to provide information that the Union has requested and that is necessary for the Union to carry out its duties as the exclusive and duly designated collective-bargaining representative of our employees.

WE WILL NOT refuse to bargain collectively with the Union by refusing to permit the Union's authorized representatives to have access to our premises so that they may carry out their duties as the duly designated collective-bargaining representative of our employees.

WE WILL NOT interrogate our employees concerning their union membership or activities.

WE WILL NOT poll our employees concerning their own and other employees' union activities, leanings, and sympathies without first giving them requisite assurances that their answers will not be used against them.

WE WILL NOT solicit our employees to sign anti-union cards or petitions.

WE WILL NOT threaten our employees that the Company would not sign another union contract; tell our employees that the Company would sell the business before signing another union contract; and impliedly threaten employees with job loss if the Union persisted with contract demands and with the futility of bargaining if they continued to support the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, recognize and bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of our employees with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and, if an

[10] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

agreement is reached, embody such understanding in a signed agreement.

WE WILL, within 14 days from the date of this Order, make whole our employees by paying all pension, health, and welfare contributions as provided in our collective-bargaining agreement with the Union that terminated on May 30, 1998, which have not been paid and which would have been paid but for our unlawful conduct.

WE WILL, on the Union's written request, rescind the medical and dental insurance coverage for the unit employees which the Company has unlawfully implemented and immediately re-establish for these employees, without any lapse in coverage, the medical and dental insurance coverage that has been unlawfully terminated.

WE WILL, within 14 days from the date of this Order, provide the Union with the information that the Union requested on January 26, 1999.

WE WILL, within 14 days from the date of this Order, grant the Union's representatives access to our premises as required by the expired collective-bargaining agreement.

WE WILL, within 14 days from the date of this Order, make whole our employees for any losses they sustained as a result of our contributions to health and welfare funds other than those authorized by employees as indicated above.

WE WILL, on the Union's request, rescind the 401(k) plan that the Company has unilaterally and unlawfully implemented.

STAN SCOTT D/B/A SCOTT BROTHERS DAIRY

Mori Pam Rubin, Esq., for the General Counsel.
Norman E. Jones (Jones, Jones & Jones), of Newport Beach, California, for the Respondent.
Jeffrey L. Cutler and *Nicholas J. Waddles, Esqs. (Wohlner, Kaplon, Phillips, Young & Barsh),* of Encino, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

FREDERICK C. HERZOG, Administrative Law Judge. These cases were heard by me in Los Angeles, California, on January 19 and May 18, 1999, and are based on charges (subsequently amended) filed by Wholesale and Retail Food Distribution Teamsters Local 63, affiliated with the International Brotherhood of Teamsters, AFL–CIO (the Union) on June 23, 1998, and January 27 and February 17, 1999, alleging generally that Stan Scott d/b/a Scott Brothers Dairy, a sole proprietorship (Respondent) committed certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). On September 29, 1998, and March 25, 1999, the Regional Director for Region 31 of the National Labor Relations Board (the Board) issued complaints and notices of hearing, subsequently consolidated, alleging violations of Section 8(a)(1) and (5) of the Act. Respondent filed timely answers to the allegations contained within the complaints, denying all wrongdoing.

All parties appeared at the hearing, and were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Based on the record, and my observation of the demeanor of the witnesses, and my consideration of the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaints allege, and the answers admit, that Respondent is a sole proprietorship, owned by Stan Scott, doing business as Scott Brothers Dairy, at its facility located in Chino, California, engaging in the business of processing, packaging and distributing dairy products and juices; and that in the course and conduct of its business operations, it annually purchases and receives in California goods valued in excess of $50,000 directly from entities outside the State of California.

Accordingly, I find and conclude that Respondent is now, and at all times material here has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaints allege that the Union is now, and at all times material here has been, a labor organization within the meaning of Section 2(5) of the Act. While Respondent's answers claim that Respondent has no knowledge of this matter, and, therefore, deny it, Respondent ultimately stipulated to the truth of the allegations in the complaints. Moreover, it is clear and undenied that Respondent has for many years had a collective-bargaining relationship with the Union. Additionally, according to the credible, undenied testimony of Carlos Barnett, the Union's business representative, the Union maintains collective-bargaining relationships with many employers, with whom it deals regarding grievances, wages, working conditions, and benefits of employees. Additionally, employees participate therein (for example, by serving on committees, and by serving as stewards).

Accordingly, I find and conclude that the Union is now, and at all times material here has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Labor Relations History

Based on the allegations in the complaints, as admitted in Respondent's answers, I find and conclude that since on or about 1973 the Union has been the designated collective-bargaining representative of the unit described below, and ever since that time, until recently, the Union has been recognized as the representative by Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from June 1, 1995, through May 30, 1998.

The unit appropriate for collective bargaining, as described in the agreements noted above, is as follows:

> Included: All milk plant and combination plant employees, wholesale route drivers, semi-truck drivers and tank drivers employed by the Respondent at its Chino, California facility.

Excluded: All other employees, guards and supervisors as defined in the Act.

Accordingly, I find and conclude that at all times material here, unless shown otherwise below, since about 1973 the Union has been the exclusive duly designated collective-bargaining representative of the employees in the unit described above.

As admitted in the answer, Respondent's agreement with the Union contained union-security provisions including, inter alia, union membership after 30 days' employment, union dues deductions, and employer notification to the union of new hires, and provisions for employer contributions on behalf of unit employees to the South Bay Teamsters and Employers Benefit Trust Fund health plan and to the Western Conference of Teamsters Pension Trust Fund (the Teamster Trust Funds).

As admitted in the Answer, Respondent and the Union commenced negotiations for a successor collective-bargaining agreement on or about May 8, 1998.

As admitted in the answer, on or about July 1, 1998, Respondent implemented and made retroactive to June 1, 1998, a $1-per-hour increase in unit employee hourly wages.

B. The Issues and Factual Findings

1. The alleged violations of Section 8(a)(1)

a.

The amended complaint in Case 31–CA–23438 alleges that Respondent, at the facility, between March 27 and 30, 1998, unlawfully polled employees as to their union sentiments, and solicited them to sign an antiunion petition, later filed by Respondent in Case 31–RM–1258.

According to the stipulated facts, Respondent, through Vincent Sartain, at the Chino facility, polled unit employees as to their union sentiments and solicited them to sign an antiunion petition, which Respondent later filed in support of the petition in case 31–RM–1258. Thus, I find and conclude that the facts alleged in paragraph 8 of the amended complaint in Case 31–CA–23438 are true.

b.

The amended complaint in Case 31–CA–23438 alleges that Respondent, through an admitted supervisor named Vincent Sartain, told an employee on or about March 27, 1998, that Respondent would not sign another union contract, and impliedly threatened the employee with job loss if the Union persisted with contract demands.

Employee Kevin McPhetridge credibly, though reluctantly, testified that on March 27, 1998, his supervisor, Sartain, talked to him in the driver room and in the office of Peauroi. McPhetridge recounted that Sartain asked him if he'd heard the rumors concerning upcoming negotiations and the possibility of a strike. After adverting to McPhetridge's financial state and his ability to withstand a strike, Sartain went on to state that Respondent wouldn't hold it against him if he felt he had to look elsewhere for a job, that Peauroi wasn't going to sign another contract, and that things were going to get complicated at the Dairy. McPhetridge recalled that he told Sartain that he couldn't afford to go through a strike, and that he asked Sartain what his options were. Sartain responded that he couldn't offer him anything, but handed him a paper to read. It is unclear just what the paper contained, but it is quite clear from McPhetridge's further testimony that Sartain went on to talk to him about obtaining benefits other than what the Union had been able to obtain previously.

McPhetridge's testimony is not rebutted or challenged by Respondent. Accordingly, I find and conclude that the facts alleged in paragraph 9(a) of the amended complaint in Case 31–CA–23438 are true.

c.

The amended complaint in Case 31–CA–23438 alleges that on or about March 30, 1998, Respondent threatened an employee that Respondent would sell the Company rather than sign a union contract.

Employee Jeffrey Shane Robbins credibly testified at trial that on March 30, 1998, he served Respondent as a delivery driver, and that at about 4:30 a.m. Supervisor Vincent Sartain approached him and directed him to go into the office of Supervisor Rene Peauroi. There, Sartain told him that Peauroi was done with the Union and was going to sell the Company before he signed another union contract. Robbins also credibly testified that Sartain gave him a paper and explained that it was a petition for a vote, but that, though he didn't have to sign anything, Peauroi was looking for better benefits and pension plans than the ones the Union was offering us, that they could not show us the benefits without taking a vote to let them offer these benefits to us, and that they had to have at least seven votes to get this approved. Robbins stated that Sartain went on to explain that lots of employees had complaints about the benefits packages and were unhappy with the retirement plan and that's why they were trying to get another package. Robbins testified that he told Sartain that he'd been there only a short time, and didn't want to cause trouble with other employees. Robbins testified, however, that Sartain told him that he had to have an answer that day. Robbins told Sartain that he would get back to him, though he never did. Sartain wouldn't let him keep the paper with the new benefits package explanation, but simply directed Robbins to keep their conversation quiet.

Robbins' testimony is not rebutted or challenged by Respondent. Accordingly, I find and conclude that the facts alleged in paragraph 9(b) of the amended complaint in Case 31–CA–23438 are true.

d.

The amended complaint in Case 31–CA–23438 alleges that on or about April 7, 1998, Respondent interrogated an employee as to whether he had attended a union meeting.

Employee Robbins also credibly testified that on April 7, 1998, Supervisor Rene Peauroi called him into his office and asked him if he'd attended a union meeting the previous Saturday

Robbins' testimony is not rebutted or challenged by Respondent. Accordingly, I find and conclude that the facts alleged in paragraph 9(c) of the amended complaint in Case 31–CA–23438 are true.

e.

The amended complaint in Case 31–CA–23438, at paragraph 10, alleges that on or about September 15, 1998, Respondent assisted in the holding of an antiunion meeting for unit employees, and in the solicitation of unit employees' signatures on an antiunion petition later filed in support of Case 31–RD–1394.

Roy Emit Athey, a maintenance mechanic for Respondent, credibly testified that on September 15, 1998, he attended a meeting at Respondent's premises, pursuant to a notice he'd seen posted the preceding day on Respondent's letterhead. Approximately 14 employees attended (out of an employee complement stipulated to consist of approximately 20–22 employees). The meeting was held during working hours, and no one told him to clock out during the meeting. He believes that he was paid for his time in the meeting. The meeting was conducted by an employee named Steve Edmondston, who explained to them that the purpose of the meeting was to decertify the Union. Athey credibly testified that he observed four or five employees sign a paper to decertify the Union during the course of the meeting.

Respondent stipulated to a list of 10 names who were among its employee complement and who were paid for working all during the afternoon during which the meeting was held; from among those on the list, Athey testified that he, Candelaria, and Cortez were all at the meeting.

Employee Steve Edmondston testified that it was his idea to hold a meeting and that Respondent did nothing to put him up to it. Thus, so he credibly testified, he posted a notice, not on Respondent's letterhead, but on plain paper. He testified that he clocked out for the meeting, and that he told some of those in attendance to do so. Edmondston confirmed the presence of employees Roy Athey, Chris Candelaria, Arthur Hernandez, Jose Cortez, Martin Chevas, Francisco Medel, and Jorge Garcia at the meeting. However, it is clear that he had no knowledge as to whether or not they all did clock out to attend the meeting. Edmondston justified using Respondent's premises for the meeting by his recollection that during a previous negotiation between Respondent and the Union employees had attended the negotiations and that they'd been held on Respondent's premises.

Thus, based on the stipulation of the parties, and the testimonies of Athey and Edmonston it is clear that approximately seven employees were paid by Respondent for the time during which they attended a meeting in which they were solicited to sign an antiunion petition which was to serve as the predicate for a petition to decertify the Union. Indeed, by all accounts, approximately four or five employees actually signed the petition at that time.

Accordingly, I find and conclude that the facts alleged in paragraph 10 of the amended complaint in Case 31–CA–23438 are true.

2. The alleged violations of Section 8(a)(5) in Case 31–CA–23438

It is alleged that from and after July 1, 1998, Respondent implemented and made retroactive to June 1, 1998, certain additional changes in wages and working conditions of the unit, including inter alia ceasing union dues deductions and notification to the Union of new hires, and ceasing all contributions to the Teamster Trust Funds, replacing them with a health plan provided by Care America, and a 401(k) retirement plan.

The record contains the stipulation of the parties that in August 1998, Respondent implemented its 401(k) plan under which Respondent makes a $1/hour contribution for each employee (up to $40/week.) Respondent makes this contribution to the plan regardless of whether or not the employee directs any additional money to their plan. In addition, Respondent gives each employee another $1/hour (up to $40/week) which the employee can either choose to receive as wages or direct to the 401(k) plan. Although employees can contribute more to their 401(k) plan, Respondent does not match such additional contributions.

Additionally, the record contains an array of documents bearing dates from and after March 16, 1998, including letters between the parties and contract proposals. Important among them is a letter dated June 17, 1998, in which Respondent noted that the employees had rejected its last and final offer, and that, as a result, an impasse had been reached and that Respondent intended to put its last and final offer, a copy of which was attached, into effect on July 1, 1998, retroactive to June 1, 1998. Further meetings and correspondence between the parties followed, most notably with the Union requesting certain information from Respondent, and Respondent claiming to have furnished it.

On September 21, 1998, Steve Edmondson filed a petition to decertify the Union in Case 21–RD–8516. By letter dated November 19, 1998, the Regional Director dismissed the petition, large based on the finding of the investigation that the showing of interest was tainted by virtue of the Employer participating in obtaining it, and by various unfair labor practices of the Employer.

It was stipulated at trial that, pursuant to the collective-bargaining agreement described above between Respondent and the Union, Respondent made payments to the South Bay Teamsters and Employers Benefit Trust Fund (for medical, hospital, prescription drugs, dental, vision, and death benefits) and the Western Conference of Teamsters Pension Trust Fund through the month of May 1998.

It was stipulated that Respondent has not made any payments to the heath and welfare funds described above for the period June 1998 through the present.

It was further stipulated between the parties that:

> 1. With respect to the pension trust fund described above Respondent made no payments to said fund during the period June 1998, through present. However, pursuant to the settlement of District Court litigation, Respondent has agreed to make payments to said fund for the period June 1998, through September 1998.
>
> 2. Pursuant to Article VI of the collective-bargaining agreement described above, Respondent deducted monthly dues and/or initiation fees from the wages of each unit employee and Respondent remitted said deduction to the Union.
>
> 3. In June 1998, Respondent reimbursed employees for dues it had deducted from their wages and did not remit said dues to the Union.
>
> 4. At all times since June 1998, Respondent has not deducted dues and/or initiation fees from the wages of employees and has stopped remitting said dues to the Union.

Based on these stipulated facts, I find and conclude that the allegations made and contained in paragraphs 12 and 13 of the Amended Complaint in Case 31–CA–23438 are true.

3. The alleged violations of Section 8(a)(5) in Cases 31–CA–23704 and 31–CA–23741

The consolidated complaint in Cases 31–CA–23704 and 31–CA–23741 alleges that:

1. Respondent withdrew recognition from the Union on January 25, 1999.

2. Respondent, notwithstanding the fact that the just expired collective-bargaining agreement contained a provision permitting representatives of the Union to be admitted to Respondent's premises, ceased permitting the Union access to Respondent's premises on or about January 25, 1999, in the absence of an impasse and without affording the Union notice or opportunity to bargain with respect to such conduct, which is a mandatory subject for collective bargaining.

3. Respondent has failed and refused to provide requested information to the Union, which information is necessary for and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the employees in the unit, described above.

Each factual allegation in the preceding subparagraphs was admitted by Respondent.

However, Respondent denies that the actions admitted as to subparagraph 2 were taken in the absence of an impasse in bargaining with the Union and without affording the Union an opportunity to bargain with respect to this conduct. Additionally, Respondent denies that the information referred to in subparagraph 3 was necessary for or relevant to the Union in order to perform its duties.

C. Discussion and Conclusions[1]

1. Respondent violated Section 8(a)(1) in each respect alleged

I conclude that the factual findings made in B,1,(a) through (e), above, necessarily lead to the conclusion that Respondent has violated Section 8(a)(1) of the Act in each respect alleged in the amended complaint.

Specifically:

By polling employees concerning their union sympathies or leanings, and by soliciting them to sign an antiunion petition; and,

By interrogating employees concerning their own or other employees' union activities, leanings or sympathies; and,

By telling an employee that Respondent would not sign another union contract, and impliedly threatening the employee with job loss if the Union persisted with contract demands; and,

By threatening an employee that Respondent would sell the company rather than sign a union contract; and, Respondent has interfered with, and restrained and coerced employees in their free choice of whether or not to support the Union.

Respondent has interfered with, restrained, and coerced employees in their free choice of whether or not to support the Union.

In circumstances where an employer calls employees into management offices, the situs of authority at the employer's premises, and both polls them and questions them about their own and others' union activities, he will normally be found to have violated the Act, without more. *Astro Printing Services*, 300 NLRB 1028, 1034 (1990); *Yerger Trucking*, 307 NLRB 567, 569 (1992).

In this instance where the employer polled the employees about their support for the Union, Respondent clearly and bluntly violated Section 8(a)(1). This was especially true in this case, where such a meeting is unusual; here, Respondent's route manager admitted that, not only was such activity "unusual," it was unprecedented. Such activity by an employer is at least potentially disruptive of the collective-bargaining relationship between an employer and a union, and also unsettling to the employees involved. Because of this potential for coercion, the Board has held that before an employer can poll its employees about their continued support for a union, it must first have a reasonable doubt, based on objective considerations, that the union continues to enjoy majority support, and must provide the procedural safeguards long ago provided for in *Strucknes Construction Co.,* 165 NLRB 1062 (1967), revd. 353 F.2d 852 (D.C. Cir. 1965), including the requirement that a secret ballot be used to conduct the poll. Here, Respondent has not been shown to have even attempted, much less met with, the requirements of *Strucknes*. The poll must accordingly be, and hereby is, found to have been illegal. *Texas Petrochemicals Corp.,* 296 NLRB 1057 (1989), modified 923 F.2d 398 (5th Cir. 1991), rehearing denied 931 F.2d 892 (5th Cir. 1991). The Board's *Texas Petrochemicals* test was recently approved by the Supreme Court *in Allentown Mack Sales & Services v. NLRB*, 522 U.S. 359 (1998).

That finding is all the more mandated where, at the same time, as here, the employer informs the employees that union activities are utterly futile because it will never again sign a collective-bargaining agreement with their chosen representative, *Baby Watson Cheesecake*, 320 NLRB 779, 785 (1996); and hints darkly about his concern for employees' ability to financially weather a strike, it amounts to a threat of reprisal against employees for having engaged in union activities. Cf. *Antonino's Restaurants*, 246 NLRB 833 (1979), enfd. 648 F.2d 1206 (9th Cir. 1981).

If all that were not enough, the conclusion became inescapable when Respondent called an employee into the offices and bluntly told him that the Employer was "done with" the Union, and would "sell the company before it would agree to another union contract." Such conduct amounts to a bald and blatant threat of reprisal, and is illegal. *C. M. Brier Corp.,* 310 NLRB 1362 (1993); *Caterpillar, Inc.,* 321 NLRB 1178, 1181 (1996); and *Baby Watson Cheesecake,* supra.

Finally, taking into account that the actions just mentioned took place in the period just preceding the expiration of the last collective-bargaining agreement between the Employer and the Union, Respondent placed a capstone on its illegal activity by, following the beginning of negotiations for a new collective-bargaining contract, paying employees for their time during which they were solicited to sign a petition to decertify the Union. This clear toleration by Respondent of the activities of antiunion employees, in the context of other unfair labor practices, coupled with the payment of wages to employees attending a meeting where an antiunion message was to me deliv-

[1] There are virtually no factual conflicts in these cases. Moreover, even where a difference appears, it seems of relatively little importance. Instead, my recitation of the facts herein is drawn almost entirely from stipulations of fact, which are set forth in the record, and, in a few instances, from undisputed testimony. Thus, only in the minor instances where there is a factual conflict between the parties have I set forth the details of the evidence, and resolved the conflicts.

ered, amount to solicitation, tacit approval, and condonation of the antiunion employees' activities, and is illegal. *Gartner-Harf Co.,* 308 NLRB 531 (1993). For an employer to support or assist in the initiation, signing, or filing of an employee decertification petition interferes with the Section 7 rights of employees. *Placke Toyota*, 215 NLRB 395 (1974).

2. Respondent violated Section 8(a)(5) in each respect alleged in Case 31–CA–23438

The Act requires that parties negotiating a collective-bargaining agreement bargain in good faith, and that they do so until either agreement is reached, or until any realistic possibility of reaching agreement has been exhausted. *Assn. of D.C. Liquor Wholesalers*, 292 NLRB 1234 (1989), enfd. 924 F.2d 1078 (D.C. Cir. 1991), citing *Taft Broadcasting Co.,* 163 NLRB 475 (1967), revg. denied 395 F.2d 622 (D.C. Cir. 1968). At the point of exhaustion, there is said to exist an impasse. The existence of an impasse is not lightly inferred, and the burden of proving it rests on the party asserting it. *Serramonte Oldsmobile*, 318 NLRB 80 (1995), enfd. 86 F.3d 227 (D.C. Cir. 1996).

If, before entering into a new agreement or reaching impasse following good-faith negotiations, an employer institutes changes in wages, hours, and/or terms and conditions of employment from those contained in an expired collective-bargaining agreement, the employer violates Section 8(a)(5) of the Act. *Blue Circle Cement Co.*, 319 NLRB 954 (1995), enfd. in part and denied in part 106 F.3d 413 (10th Cir. 1997).

Here, on May 20, 1998, Respondent proposed changes in the collective-bargaining agreement. The parties were still in the process of going over and understanding the Respondent's proposal when, on June 17, 1998, Respondent presented a letter claiming the existence of an impasse, and notified that Respondent would put its last and final offer to the Union into effect on July 1, 1998, retroactive to June 1, 1998.

At the negotiation session of June 29, 1998, the Respondent made a major change in its earlier stance, and proposed a 3-year contract. The Union's representative considered this change important, and said he'd take it back to the membership. Further, the parties ended this session with an agreement that further discussion of union security would be helpful.

In my opinion, not only has the Respondent failed to offer sufficient evidence to show the existence of an impasse, it has failed to offer any such evidence, beyond its bare expression of opinion to that effect. That, of course, is insufficient.

To the contrary, it seems clear that the parties had not yet had adequate opportunity to fully explore, much less exhaust, all reasonable opportunities of compromise. As a result, no impasse existed. *D. C. Liquor Wholesalers*, supra at 1235. For example, the parties had not yet even discussed the issues raised concerning Respondent's proposals for a 401(k) plan, or changes in health and welfare benefits. Instead, just to the contrary, the parties had, at this time, mutually agreed that the Union needed further time to examine those proposals before negotiating them.

Moreover, for reasons explained in the next session, no impasse was possible at that time, because at this time there still existed unremedied unfair labor practices.

To go on, however, by letter of June 23, 1998, the Union requested information concerning a summary of the health plan presented to the Union on May 27, 1998. That information had not been received by the June 29, 1998 meeting. By letter dated July 1, 1998, the Union informed the Respondent that upon its receipt, the Union would schedule a meeting to discuss it.

As a result, it is simply not possible to find that an impasse then existed. During a time when a union has not yet received information requested by it from an employer, and which is crucial to its analysis of the employers proposals, it is not possible for an impasse to exist. Cf. *Genstar Stone Products*, 317 NLRB 1293 (1995); *A.M.F. Bowling*, 314 NLRB 969 (1994), affd. in part and revd. in part 977 F.2d 141 (4th Cir. 1992);[2] *Palomar Corp.*, 192 NLRB 592 (1971), supplemented by *Gateway Service Co.*, 209 NLRB 1166, (1974).

Even in instances where an impasse exists, an employer is not free to make changes in wages, hours, and working conditions which are not encompassed within its preimpasse proposal to the union. *Blue Circle Cement Co.,* supra. Yet, an examination of C.C. Exhibit 19 shows the extensive proposals regarding health and welfare benefits which has not even been discussed, much less exhausted by the parties as of June 29, 1998.

The differences between the health care proposals of Respondent and those of the Teamsters' Plan is shown by the attachments to Joint Exhibit 3. Yet, even according to the testimony of Respondent's supervisor, Sartain, Respondent's plan provided for a higher co-pay (though he claimed that this was inadvertent by Respondent). Still, regardless of intent, it provides at least one important instance where Respondent's plan as implemented was not equaled by its "pre-impasse" offer.

For these reasons, I find and conclude that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing changes that were not within the contemplation of Respondent's final bargaining offer.

The record fully supports a finding that in early May 1998, employees signed dues-checkoff cards. They did so in response to a request by the Union, which, in turn, was in response to a request for information from the Respondent. There is no evidence that any such card was ever revoked by an employee. Nor do the cards limit, on their face, their application or duration to coincide only with the existence of the union-security requirement. Thus, I do not presume that the signers of the cards intended that they expire with the collective-bargaining agreement.

Yet, it is admitted that Respondent ceased remitting dues to the Union on the contract's expiration.

The Board has held that most terms and conditions of employment survive the expiration of the collective-bargaining agreement. And, it is noted that there is no statutory requirement that unrevoked dues-checkoff cards expire with the expiration of the contractual union-security provision which they enforce. While it is only under the proviso to Section 8(a)(3) that an employer may enter into and enforce union-security provisions, there is no statutory tie-in to checkoffs. For example, checkoff provisions are frequently agreed to and enforced in right-to-work States, the very same States where union security would be unlawful. The Board has held that the continua-

[2] I am aware that several of the cases cited by me in this decision have been denied enforcement, or have been modified. However, as an administrative law judge, I am bound to follow announced Board policy and precedent until such precedent or policy is modified or reversed by the Board itself or the Supreme Court. *Atlanta Hilton & Tower*, 278 NLRB 474 (1986).

tion of unrevoked dues checkoff in the absence of a union-security provision. See *Lowell Corrugated Container Corp.,* 177 NLRB 169 (1969); *West Coast Cintas Corp.*, 291 NLRB 152 (1988); *Sun Harbor Caribe, Inc.,* 237 NLRB 444 (1978); *Frito Lay*, 243 NLRB 137 (1979); *Chemical Workers Local 143 (Lederle Laboratories),* 188 NLRB 705 (1971). Nor do I see that Section 302 requires a result that checkoff does not survive the expiration of the contract. However, in any event, that decision is not for me to make.

Finally, I do not see that the holding in *Bethlehem Steel Co.*, 136 NLRB 1500 (1962), militates in favor of so finding. This is so because, in this case, unlike *Bethlehem*, the language of the contract's provision for checkoff makes provision for its enforcement during successive collective-bargaining agreements.

Thus, I shall simply apply the Board's general rule, and hold that the checkoff provisions here, like contractual provisions generally, survive the expiration of the contract, and may not be unilaterally changed by the employer.

Accordingly, I find and conclude that by discontinuing the dues-checkoff provisions, the Respondent violated Section 8(a)(5)(1) of the Act.

3. Respondent violated Section 8(a)(5) in each respect alleged in Cases 31–CA–23704 and 31–CA–23741

a. The Withdrawal of Recognition

By letter dated January 20, 1999, the day after the opening of the hearing in Case 31–CA–23438, Respondent withdrew its recognition of the Union and informed the Union that it no longer would have access to Respondent's premises. The evidence shows that during a pretrial settlement conference, prior to that hearing, in connection with a discussion about Respondent's potential liability, Respondent's representative, Jones, informed the Union that Respondent was not concerned about the liability because they were going to incorporate the business in February 1999. Furthermore, during a mediation session in early January 1999, Jones told the Union that he was giving them notice that Respondent was going to incorporate. Again, Jones said that the corporation would then become another corporation.

After twice being told that Respondent would incorporate, by letter dated January 20, 1999, the Union requested information from Respondent about the incorporation. Then, by letter dated January 26, 1999, the Union made a request for specific information from Respondent. Respondent has not replied to the information requests and has not provided any of the information requested.

Finally, as admitted, Respondent withdrew recognition from the Union.

A union is irrebuttably presumed to continue to enjoy the support of a majority of the unit employees while a collective-bargaining agreement is in effect and after the contract expires, the union still is presumed to enjoy majority status, but the presumption is rebuttable. *Lee Lumber,* 322 NLRB 175, 176 (1996), as supplemented, affd. in part and remanded in part 117 F.3d 1454 (D.C. Cir. 1997). The burden of rebutting the presumption of continued majority support for the union after the expiration of a collective-bargaining agreement rests with the employer. *Hooper's Chocolates,* 319 NLRB 437, 441 (1995).

After the expiration of a collective-bargaining agreement, an employer may rebut the presumption and withdraw its recognition of the union by affirmatively establishing that either the union in fact no longer has the support of a majority of the unit employees, or that the employer has a reasonably based doubt, based on objective considerations, as to the union's continued majority status at the time the employer refused to bargain. Id and *Lee Lumber,* supra at 176–177. The Employer must establish either of these two defenses by a "preponderance of the evidence." *Alcon Fabricators,* 317 NLRB 1088, 1090 (1995), enf. den. 113 F.3d 1235 (6th Cir. 1997)

Most importantly, in the context of the facts of this case, an employer's withdrawal of recognition must occur in a context free of unfair labor practices. *Radisson Plaza,* 307 NLRB 94, 96 (1992), enfd. 987 F.2d 1376 (8th Cir. 1993) As the Board noted in *Lee Lumber,* supra at 176–177, any "good faith" doubt, or question of representative status, "must be raised in a context free of unfair labor practices of the sort likely, under all the circumstances, to affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship itself." *Lee Lumber,* supra at 176–177.

In other words, an employer may engage in actions which are reasonably calculated to "manufacture" its own "good-faith doubt."

The unremedied unfair labor practices committed by the Respondent here, as established in Case 31–CA–23438, preclude either a good-faith doubt defense, or a defense of actual loss of majority.

The evidence presented in Case 31–CA–23438 establishes that Respondent committed various and serious unfair labor practices detailed above, including the following:

> During the period March 27 through March 30, 1998, prior to the expiration of the last collective-bargaining agreement, Respondent unlawfully polled unit employees about their union sentiments and solicited them to sign an anti-union petition, which Respondent later filed in support of the petition it filed in Case 31–RM–1258;
>
> During that same period of time, Respondent unlawfully threatened employees with loss of employment, informed employees that Respondent would not sign a contract with the Union, and unlawfully interrogated an employee as to whether he had attended a union meeting;
>
> In about July 1998, Respondent violated Section 8(a)(1)(5) by unilaterally implementing changes in wages and working conditions of unit employees, including changes in the health and welfare and pension plans, at a time when the parties had not bargained to impasse, and Respondent violated Section 8(a)(1)(5) of the Act by unilaterally implementing changes that were not within the contemplation of Respondent's final bargaining offer; and
>
> On September 15, 1998, Respondent unlawfully assisted in the circulation of an employee decertification petition by permitting employees to hold a meeting to discuss decertification of the Union on its premises, by paying employees for the time they attended the meeting and by arranging for supervisors to cover the work of employees so that they could attend the meeting.

Further, Respondent's unilateral implementation of the health and welfare and 401(k) plan clearly undercuts the Union's status and support. In *ABC Automotive Products Corp.,*

307 NLRB 248, 250 (1992), supplemented 319 NLRB 874 (1995) (a case involving that employer's announcement of its intent to unilaterally institute its own health and welfare plan to replace the union's welfare fund), the Board noted that:

> The damage to the bargaining relationship had been accomplished simply by the message to the employees that the Respondent was taking it on itself to set this important term and condition of employment, thereby "emphasizing to the employees that there is no necessity for a collective bargaining agent" (citations omitted).

Similarly, in *Guerdon Industries,* 218 NLRB 658, 661 (1975), the Board found that an employer's unilateral announcement and implementation of an incentive plan, and its threat to halt the plan if the union negotiated a wage increase, were exactly the type of unfair labor practices which would "improperly affect the bargaining relationship so as to negate the legality of a later withdrawal of recognition." In this regard, the Board noted in *Guerdon*, id at 661–662, that the employer's indication to employees that it could confer or withdraw benefits without regard to the union "necessarily tended to undermine the union's authority among the employees . . with erosion of majority status the probable result."

In the instant case, it is evident that the unfair labor practices committed by Respondent are of the type that "would improperly affect the bargaining relationship so as to negate the legality of the later withdrawal of recognition." *Rock-Tenn Co.,* 319 NLRB 1139, 1146 (1995), enfd. 101 F.3d 1441 (D.C. Cir. 1996), citing *Guerdon Industries,* supra at 661 (1975). Thus, Respondent's action in making significant unilateral changes to important terms and conditions of employment deprived the union of the opportunity to represent the employees with respect to these issues and, therefore, it is foreseeable that the employees would become disenchanted with the union which, apparently could do nothing for them. See *Lee Lumber,* supra at 177.

Recently, in *Mathews Readymix,* 324 NLRB 1005, 1007 (1997), enfd. 165 F.3d 74 (D.C.Cir. 1999), the Board held that unfair labor practices need not be explicitly designed to undermine union support in order to taint subsequent employee expression of disaffection. In that case, the Board found that interrogations of applicants concerning their union membership were sufficient to taint a decertification petition and preclude the employer's reliance on it to support a good-faith doubt of majority status. In this regard, the Board concluded that it was reasonable to infer a casual relationship between the coercive interrogations of the employees and their subsequent willingness to sign a decertification petition.

Similarly, in *Williams Enterprises,* 312 NLRB 937 (1993), enfd. as supplemented 50 F.3d 1280 (4th Cir. 1995), the Board found that a successor employer's statements to union-represented employees of the predecessor that they intended to operate nonunion tainted a decertification petition presented to the successor 4 months later. In this regard, the Board considered the factors set forth in *Master Slack Corp.,* 271 NLRB 78, 84 (1984), which relate unlawful conduct to decertification activity that is alleged to support withdrawal of recognition. These factors are:

> The length of time between the unfair labor practices and the withdrawal of recognition;
>
> The nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees;
>
> Any possible tendency to cause employee disaffection from the union; and
>
> The effect of the unlawful conduct on employee morale, organizational activities, and membership in the union.

Although the General Counsel need not establish that the unfair labor practices committed by Respondent were designed to undermine union support (*Mathews Readymix*, supra at 1007), in the instant case, it is evident that this was Respondent's intent. First, in the context of unlawful polling, interrogation, and threats, Respondent solicited employees to sign an antiunion petition which Respondent attempted to use to support an RM petition. After Respondent admitted its wrongdoing and withdrew that petition, Respondent and the Union negotiated for a successor collective-bargaining agreement. Then, without bargaining to impasse, Respondent unilaterally implemented changes in the terms and conditions of employment, including matters which are of central importance to employees, such as the termination of Respondent's participation in the union Health and Welfare fund and Pension fund and the implementation of different plans. Thereafter, in continuation of its relentless effort to be rid of the Union, Respondent unlawfully assisted in the solicitation of signatures to support a decertification petition. Clearly, Respondent intended to undermine support for the Union. Although, again, as noted above, the General Counsel need not establish such an intent.

Since Respondent's withdrawal of recognition did not occur in a context free of unfair labor practices, and since the Respondent has made no effort to demonstrate that the Union has lost it's status as majority representative of the employees, I find and conclude that Respondent violated Section 8(a)(1) and (5) by withdrawing its recognition of the Union.

Not only has Respondent failed to show that the Union has lost majority support, the only evidence in this case is that it believed that some employees failed to remain current in their dues to the Union. Certainly, that is the only consideration it communicated to the Union for its withdrawal of recognition.

Respondent cannot rely on the filing of the decertification petition to justify its withdrawal of recognition. As was shown, and found, in Case 31–CA–23438, the decertification petition was tainted by Respondent's unlawful assistance in the circulation of that petition, as well as by the other unremedied unfair labor practices. Thus, even apart from Respondent's failure to meet its obligation to authenticate signatures in the decertification petition, and the taint on the petition itself, Respondent's unfair labor practices estop any use of the petition to justify the withdrawal of recognition. See *Hooper's Chocolates,* 319 NLRB 437 (1995), in which the Board noted that "[a] petition obtained by unfair labor practices cannot be used as objective considerations of a reasonable doubt of majority status."

Moreover, aside from Respondent's unlawful involvement in the solicitation of signatures for that petition, in light of the other unremedied unfair labor practices, any question concerning representation was not raised in a context free from unfair labor practices. *Hooper's Chocolates*, supra.

In *Triplett Corp,* 234 NLRB 985, 986 (1978), enf. denied 619 F.2d 586 (6th Cir. 1980), the Board noted that it frequently has held that "the showing of membership in a union or financial support of a union is not the equivalent of establishing the

number of employees who desire to be represented by the Union" and that, therefore, "the numbers of union members and employees on dues checkoff do not provide objective considerations sufficient to justify a reasonable doubt of the union's continued majority support."

In *Albany Steel,* 309 NLRB 442, 453 (1992), the administrative law judge addressed an employer's assertion that the fact that few, if any, of the employees remained members of the Union, and that none of them were paying dues, was a basis for its alleged good-faith doubt of the union's majority status. The judge noted that union membership and/or the failure to pay dues does not necessarily demonstrate a lack of union support. In this regard, the judge stated that "it is union support rather than union membership or dues payment which is the crucial fact. The lack of union membership and/or lack of dues payments, even if true, does not demonstrate a lack of union support." The judge further noted that "the issue is whether the employees do not want the union to represent them, rather than whether, without the benefit of a bargaining agreement, they want to pay dues to support the union." "'Majority support' refers to union representation, not financial support, or union membership."

Therefore, in the case here, even if Respondent had been able, as it did not, to demonstrate that very few, or none, of the employees continued to make dues payments after the contract expired, Respondent could not rely on this fact alone to prove a good-faith doubt of the Union's continued majority status.

I note that no other reasons were advanced by Respondent for its withdrawal of recognition besides the checkoff authorizations. Thus, I shall consider no other reasons advanced by Respondent. As the Board noted in a similar situation in *Triplett Corp.,* 234 NLRB 985, 986 (1978), these reasons are "mere afterthoughts and not persuasive evidence upon which the Respondent could ground a reasonable doubt of the Union's continued majority status." Instead, the employer must have been aware of facts at the time it withdrew recognition. As the Board noted in *Orion Corp.,* 210 NLRB 633, 634 (1974), enfd. 515 F.2d 81 (7th Cir. 1975), "facts regarding union support ascertained after the refusal to bargain are not controlling, or even guiding, in determining whether the employer had a reasonable basis for doubt at the time it refused to bargain." In this regard, I specifically note that Respondent's letter to the Union withdrawing recognition made no mention whatever of any statements made by employees evidencing disaffection with the Union.

b. The denial of access

Article 9.01 of the expired collective-bargaining agreement provides that "[a]uthorized representatives of the Union will be admitted to the Employer's facilities at reasonable times to assist in the settlement of grievances and to observe the administration of the Agreement after notifying the Employer of his presence." And, indeed, Respondent's past practice has been to permit union representatives access to its facility. Furthermore, it should be noted that even Respondent's last and final contract offer, which it unlawfully implemented unilaterally, does not change this contractual access language.

In its letter to the Union dated January 20, 1999, Respondent notified the Union that it no longer would be permitted onto Respondent's premises.

A provision in a collective-bargaining agreement concerning union access survives contract expiration. *T.L.C. St. Petersburg,* 307 NLRB 605, 610 (1992), enfd. 985 F.2d 579 (11th Cir. 1993); *Colonna's Shipyard,* 293 NLRB 136, 141 (1989), enfd. 900 F.2d (4th Cir. 1990). Therefore, by informing the Union that it no longer would be permitted access to its facility, Respondent violated Section 8(a)(5) and (1) of the Act. Moreover, even if the contract did not provide for such access, the unilateral change in the past practice of permitting union access is a material change about which Respondent would be obligated to bargain. *Ernst Home Centers,* 308 NLRB 848, 849 (1992).

Respondent may attempt to justify its denial of access to the Union by claiming that it was privileged to do so because the Union no longer represents a majority of the employees. However, for the reasons discussed above, Respondent was not privileged to withdraw its recognition of the Union and, therefore, this defense must fail.

c. The refusal to furnish information

Respondent has admitted that it received the Union's information request dated January 26, 1999. As Barnett testified, he sent two requests to Respondent for information. In one, dated January 20, 1999, he asked for information concerning the "incorporation" which Jones had mentioned. In the second request, he asked for details, such as the name of the new business, its form, names of officers, names of principal shareholders, and documents related to the change of business form. He testified without contradiction that no information has been provided in response to his requests, but that the Union needs the requested information in order to determine what the bargaining unit is, how the change in form affects the bargaining unit, who he needs to be negotiating with, whether he is negotiating with the proper people, etc. In addition, he testified without contradiction that the Union is concerned that the Employer will attempt to avoid its liability to the Union by changing the form of its business.

An employer has an obligation under Section 8(a)(5) of the Act to provide requested information which is relevant to a union's performance of its role as collective-bargaining representative. *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967). As the Supreme Court noted in *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979), "[t]he duty to bargain . . . includes a duty to provide relevant information needed by a labor union for the proper performance of its duties as the employees' bargaining representative."

The General Counsel has the burden of demonstrating that information which does not relate to core terms and conditions of employment within the bargaining unit is relevant. *August A. Busch & Co*., 309 NLRB 714, 720 (1992). However, the standard for relevance is a "liberal discovery-type standard." *NLRB v. Acme*, supra at 437. Therefore, assuming that the General Counsel would have the burden of establishing the relevancy of the requested information, I find that the General Counsel has met this burden.

The information requested by the Union in its letter dated January 26, 1999, clearly is relevant to the Union's performance of its duty as bargaining representative. The Union is entitled to the information so that it can evaluate what effect any change in business form would have on the bargaining unit, and so that it can determine the identity of the party with whom

the Union should bargain. See *Providence Hospital*, 320 NLRB 790 (1996), enfd. 93 F.3d 1012 (1st Cir. 1996). The information also is relevant to the Union's concern about the location of assets, out of which claims for trust fund contributions and other money due might be satisfied. *Mary Thompson Hospital*, 296 NLRB 1245, 1250 (1989), enfd. 943 F.2d 741 (7th Cir. 1991).

In light of the statements by Respondent's representative that the Employer would be incorporated in February 1999, and the fact that the parties have been involved in negotiations for a new collective-bargaining agreement, the information request was not premature. See *Providence Hospital*, id at 795. Clearly, it may be reasonably anticipated that Respondent may in the future seek to evade and avoid its duty to bargain by claiming that a change in the form of its ownership precludes such bargaining.

Moreover, as the judge noted in *Providence Hospital,* supra, a defense that an information request is premature is an affirmative defense, and an employer can not wait until a charge is filed to raise the contention. In the case herein, Respondent has not asserted to the Union that the information request is premature. Rather, consistent with its withdrawal of recognition, Respondent made no reply whatsoever to the request for information.

In light of the above, and the record as a whole in Cases 31–CA–23438, 31–CA–23704 and 31–CA–23741, I find and conclude that the General Counsel has shown that Respondent violated Section 8(a)(1)(5) of the Act, as alleged, and that an appropriate remedial order issue forthwith.

In view of the above, I find and conclude that counsel for the General Counsel has proven that Respondent violated Section 8(a)(1) and (5) of the Act, as alleged in the complaints.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is now, and at all times material here has been, duly designated collective-bargaining representative of the employees of Respondent in the unit described below:

4. The unit appropriate for collective bargaining, as described in the agreements noted above, is as follows:

> Included: All milk plant and combination plant employees, wholesale route drivers, semi-truck drivers and tank drivers employed by the Respondent at its Chino, California facility.
>
> Excluded: All other employees, guards and supervisors as defined in the Act.

5. Respondent has violated Section 8(a)(1) of the Act by:

(a) Polling employees concerning their own and other employees union activities, leanings, and sympathies without having first given them requisite assurances that their answers will not be used against them.

(b) Interrogating employees about their own, or others' union activities, leanings, or sympathies.

(c) Soliciting employees to sign an antiunion card or petition.

(d) Threatening employees that it would not sign another union contract, and by telling employees that the Employer would be sold before it would sign another union contract, and impliedly threatening employees with job loss if the Union persisted with contract demands.

6. Respondent has violated Section 8(a)(5) of the Act by:

(a) Withdrawing recognition from the Union.

(b) Unilaterally implementing a wage increase and a 401(k) plan for employees and paying into it.

(c) Unilaterally implementing a health and welfare plan for employees

(d) Prohibiting access to Respondent's premises by the Union.

(e). Failing and refusing to furnish information to the Union as requested by letter dated January 26, 1999.

(f) Ceasing to deduct and remit to the Union the union dues called for by the expired collective-bargaining agreement.

7. The above unfair labor practices have an effect upon commerce as defined in the Act.

THE REMEDY

In order to effectuate the policies of the Act, I find it necessary that Respondent be ordered to cease and desist from the unfair labor practices found, and from like or related invasions of the employees' Section 7 rights, and to take certain affirmative action.

Having found that Respondent violated the Act by withdrawing recognition from the Union, I shall require the Respondent to again recognize the Union as the exclusive collective-bargaining representative of the employees in the unit described below, and to bargain collectively with it in good faith until an agreement has been reached or a valid impasse results.

Having found that Respondent violated the Act by failing and refusing to provide information which was properly requested by the Union, and which is necessary for the Union to carry out its duties as the duly designated exclusive collective-bargaining representative of all the employees in the unit described below, I shall require that Respondent furnish the Union with the requested information within 10 days of the date of the Board's Order.

Having found that Respondent violated the Act by implementing a wage increase and a 401(k) plan, and by making payments to it on behalf of employees, I shall require that Respondent, if requested by the Union within 60 days of the Board's Order, rescind and revoke the 401(k) plan. (I make no provision here for any employee being required to repay the moneys received from Respondent for their wage increase or 401(k) plan accounts.)

Having found that Respondent violated the Act by substituting a medical and dental insurance program for the medical and dental insurance program which had previously covered the unit employees, I shall require that Respondent restore, on the Union's written request, the medical and dental insurance program which was in effect previously. In order to allow the Union ample opportunity to consider whether to request the reinstatement of the previous medical and dental insurance program, while not leaving the matter open indefinitely, I shall require that the Union be required to make its decision within 60 days of the date of the Board's Order. If the Union does not request the reinstatement of the medical and dental insurance program which was in effect prior to the Respondent's program, the Respondent's program will remain in effect. Respondent will have 40 days after the receipt of the Union's written

request to replace the medical and dental program with the previous program.

Having found that Respondent violated the Act by discontinuing making contributions on behalf of the unit employees into the pension and health and welfare trust funds included in the Respondent's expired contract with the Union, I shall recommend that Respondent make whole the unit employees by paying all pension, health, and welfare contributions into the trust funds which have not been paid and which would have been paid but for the unlawful conduct found here, and continue such payments until such time as the Respondent negotiates in good faith with the Union to a new contract or impasse or, as described above, the Union fails to make a written request for the restoration of the health and welfare program requiring such contributions.[3]

In view of the variety and severity of Respondent's unfair labor practices, I provide for a broad order here.

[Recommended Order omitted from publication.]

[3] Because the provisions of employees benefit fund agreements are variable and complex, the Board does not provide for interest at a fixed rate on fund payments due as part of a "make whole" remedy. I therefore leave to further proceedings the question of any additional amounts the Respondent must pay into benefit funds to satisfy my remedy here. These additional amounts may be determined, depending on the circumstances of each case, by reference to provisions in the documents governing the funds involved and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful action, which might include the loss of return investment of the portion of the funds withheld, additional administrative costs, etc., but no collateral losses. See *Merryweather Optical Co.,* 240 NLRB 1213, 1216 fn. 7 (1979). To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, by the amount that the Respondent otherwise owes the fund.